Mississippi Transport, Inc. *and* General Drivers, Helpers and Truck Terminal Employees, Local Union No. 120, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Case 18–CA–11809

May 11, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 18, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mississippi Transport, Inc., Stillwater, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Joseph H. Bornong, Esq., for the General Counsel.
Daniel Wachtler and *William P. Seehafer, Esqs. (Briggs & Morgan)*, of St. Paul, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. General Drivers, Helpers and Truck Terminal Employees, Local Union No. 120, affiliated with International Brotherhood of Teamsters (Union) filed an unfair labor practice charge against Mississippi Transport, Inc. (Respondent or Company) on June 26, 1991.[1]

On August 22, the Regional Director for Region 18 of the National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act).

[1] All dates refer to the 1991 calendar year unless otherwise indicated.

Respondent timely answered the complaint on September 5 denying that it engaged in the unfair labor practices alleged. The complaint was docketed for hearing before an administrative law judge.

I heard this matter on December 17 and 20 at Minneapolis, Minnesota. After carefully considering the record, the demeanor of the witnesses, and the posthearing briefs filed by the General Counsel and Respondent, I find Respondent engaged in the unfair labor practices alleged based on the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The complaint alleges Respondent violated Section 8(a)(1) of the Act by: (1) soliciting reports of employee union activity; (2) creating the impression that employees' union activities were under surveillance; and (3) interrogating an employee about signing a union card.

The complaint also alleges Respondent violated Section 8(a)(3) of the Act by discharging employee Steven Berger on June 18 for his union and concerted activities.

In his brief, the General Counsel moves to dismiss the interrogation allegation because the evidence adduced in support fails to prove the matter alleged. As the matter is not without doubt, I grant the motion.

As noted, Respondent's answer denies the unfair labor practices alleged.

B. *Facts*

1. Background

Respondent, a Minnesota corporation, maintains its headquarters and a terminal in Stillwater, Minnesota, where it is engaged in business as a contract hauler of bulk petroleum products.[2] Respondent also has terminals at Duluth and Warroad, Minnesota, but they are not involved in this proceeding.

At Stillwater, Respondent employs about 30 drivers, 3 or 4 mechanics, a truck washer, and several dispatchers. Duane Ahles, Respondent's vice president of operations, oversees the Stillwater day-to-day operations. John Shaleen, the Stillwater safety director and supervisor, directly supervises Respondent's drivers. Both are admittedly statutory supervisors.

This case arises from the Union's campaign to organize Respondent's Stillwater petroleum transport drivers. That effort began in earnest during December 1990 following unsuccessful union attempt to organize Respondent's mechanics and washers. The mechanics and washers' organizing campaign culminated in a tie vote at an October 25, 1990 NLRB election and a certification that no collective-bargaining representative had been selected by a majority in that unit.

[2] Respondent's indirect outflow to Superamerica, an employer directly engaged in commerce within the meaning of the Act, exceeds the dollar volume amount established by the Board for exercising its statutory jurisdiction. Respondent admits that it is engaged in commerce and in a business affecting commerce within the meaning of Sec. 2(6) and (7) of the Act and I find the Board has jurisdiction to resolve this labor dispute.

Respondent openly opposes the unionization of its employees; Ahles conceded consideration has been given to the possibility of transferring work to a related enterprise if its drivers become unionized. Shaleen told driver Michael Tietz sometime after the discharge at issue here that, ''I don't like unions and I don't want a union in here.''

Respondent transports petroleum products from area refineries to retail petroleum outlets in the Minneapolis-St. Paul metropolitan area. It competes with several other local contract haulers, including Dahlen, Kane, Indianhead, Wayne, and many smaller companies. Only the Dahlen and Indianhead drivers are represented by the Union.

Respondent's drivers report to the Stillwater terminal at the start of their shift where they are dispatched with a list of loads for transport that day. They then drive to the designated refinery, load the product and obtain a bill of lading, and proceed to the customer's station for unloading. This process is repeated until the day's orders are completed.

Frequently, Respondent's drivers transport petroleum products from the Ashland refinery in St. Paul Park, Minnesota, a distance of about 19 miles from the Stillwater terminal, to a variety of area retail stations. Superamerica, Ashland's retail subsidiary, accounts for about 30 to 35 percent of Respondent's revenues. Dahlen and Indianhead also haul from the Ashland refinery to the Superamerica stations.

Upon arrival at the Ashland refinery, drivers first obtain a customer card (resembling a plastic credit card) at the dispatch office, and then drive to the self-service overhead loading bays which accommodate four tank trucks per bay. There, the driver attaches an inlet hose to the tank trailer, activates the pump using the customer card and a driver's card (carried by the driver), sets the pump for the amount and type of product ordered by the retailer, and turns the pump on to start the loading process. After the load is aboard and the pump is shut down, the driver returns to the dispatch office to replace the customer card and obtain a bill of lading for the on-board order.

At a minimum, the loading process at the Ashland refinery takes about 15 minutes; frequently, drivers are detained there for half an hour or, on occasion, much longer if the dispatch office and the bays are busy or if some of the refinery equipment malfunctions. The drivers of the various different companies which haul from Ashland routinely meet at the dispatch office and at the loading bays. At such times, they discuss topics which, metaphorically speaking, range from soup to nuts but all are expected monitor the loading and paperwork processes to assure against petroleum spills and errors.

2. The drivers' organizing campaign

In the December 1990–January 1991 period, some of the unionized drivers began promoting unionization among the nonunion drivers at their Ashland refinery encounters. Indianhead drivers Jeff Johnson and James Kroschel were two of the most ardent union solicitors.[3]

Word of the union activity quickly came to the attention of company officials through reports from its drivers. Gerald Leonard said safety director Shaleen called him into his office at one point in December 1990 and told him that a new company driver reported that Leonard had been ''talking union'' at the Ashland refinery. When Shaleen disclosed further that his source said it occurred on a particular Sunday night when Leonard was not on duty, Leonard pointed that out and the conversation concluded.

Driver Tietz, who disclosed to Shaleen that he had a union card when he was first employed, said that Shaleen asked him in the Spring whether anyone had approached him about joining the Union. Tietz told Shaleen that ''some people were trying to pass out some cards at Ashland Petroleum.'' When Shaleen inquired if he was being bothered, Tietz replied that he could take care of it himself.

However, the Company began receiving reports from other employees (mainly drivers) about a number of untoward incidents, including a bogus dispatch, a false dispatch request, the splashing of winter slush on one of Respondent's trucks as two trucks passed on a city street, a charge that Respondent's driver verbally abused a female Superamerica customer, and the switching of customer cards at the Ashland dispatch office to cause incorrect bills of lading. Company officials attributed the bogus dispatch to Kroschel and Berger identified Kroschel as the driver responsible for the slush splashing.

In the latter half of March 1991, the Union held an open meeting for the drivers of all contract haulers at its hall in St. Paul. Kroschel attended and obtained authorization cards from a union agent for his use in soliciting nonunion drivers.

Both Johnson and Kroschel persisted as union promoters and card solicitors for the Union around the Ashland refinery. At first, very few of Respondent's drivers expressed interest in the Union. A few of Respondent's drivers even expressed open hostility toward the union solicitations; some interpreted Johnson's and Kroschel's persistence as harassment and complained about their conduct to company officials.[4]

Kroschel admittedly traded insults with some of Respondent's drivers about the Union. On occasion, he called the nonunion drivers ''scab'' drivers and used the same epithet in referring to the nonunion companies. He claimed that one company driver called him ''asshole'' and that the same driver once left the Ashland dispatch office when Kroschel entered saying, ''I better get out of here before some union shit rubs off on me.'' Johnson also acknowledged that some of Respondent's drivers were irritated by his repeated solicitations and that some angry exchanges occurred.

Following reports of the solicitations from its drivers and having encountered uncomplimentary claims about its service, Ahles posted his ''You must be getting to the competition.'' notice to company drivers at Stillwater dated March 26. The notice begins by accusing competitors or their drivers of spreading ''slander and lies'' and continues:

[3] Ahles said that the union activity commenced at about the same time that Superamerica realigned its hauling accounts which resulted in Respondent acquiring six high-volume stations previously serviced by its unionized competitors.

[4] Ahles said that driver Gregory Schiltz complained bitterly about the union solicitors. By mid- to late summer, Ahles provided Schiltz with a tape recorder to make contemporaneous summaries of any verbal abuse he encountered at Ashland. Later, according to Ahles, a sexually explicit solicitation was written anonymously on a wall at the Ashland refinery together with the name and phone number of Schlitz' wife.

> On the one hand they are pushing you and harassing you about joining the Union and on the other they are trying to take your jobs[.]
>
> Today I had a call from Ashland who informed me they had received a photo of our unit dropping product with no one in attendance, no fire extinguisher out, and no vapor recover hose hooked up. This photo was sent to them by someone who said he was a Unocal driver. Interesting that he carrys [sic] a camera with him. He should know that he is a Uno-Ven driver. I believe that it is another carrier who used Uno-Ven as a cover.
>
> I have heard a rumor that one of our drivers had a spill at AN SA and our driver paid off the manager not to report it.
>
> These types of rumors and lies have become an every day occurance [sic].
>
> *I am asking you to be sure that you do everything right*. You are being watched.
>
> If you are harassed at the rack or while you are working about union activities I want to know immediately. When, where and who.
>
> You do not have to put up with this from people who are more interested in causing you trouble than in doing the job they are getting paid for (even if their pay is less than yours).
>
> Do your job right—we will continue to grow and we will continue to have a job.
>
> I thank you for your performance in the past months. You come through the winter with a great safety record. I have every confidence that you will be able to cope with this situation. [Emphasis in the original.]

Solicitations by Johnson and Kroschel continued over the next 2 months without much apparent success among Respondent's drivers. However, Kroschel said he had noticed a changed attitude in late May or early June after hearing rumors that certain new company policies upset several of Respondent's drivers and that some would now consider unionization.

In fact, on June 6 Ahles posted and distributed a memorandum which altered driver scheduling procedures. This change established mandatory call-in and work requirements for unscheduled workdays.

More specifically, Berger said that the drivers' work schedules were generally posted 2 weeks in advance. Ahles' June 6 memo states that the normal workweek is 48 hours but, if work is available, drivers are expected to work up to 60 hours. The June 6 memo provides that drivers who have worked at least 48 hours but less than 56 hours must telephone the terminal on their offdays and a mandatory rule that those drivers must accept available assignments. In the memo's concluding sentences, Ahles emphasized that excuses such as babysitter difficulties, a wife's day off, and fishing would not be accepted for refusing offday assignments since such activities did not have priority over customer demands.

In the meantime, on June 8 Kroschel and Shaleen loaded gasoline at adjacent racks at the Ashland refinery.[5] Kroschel, unfamiliar with Shaleen's identity, spoke with Shaleen at the loading bay. Kroschel thought Shaleen was a new driver; he noticed Shaleen was wearing a shirt bearing the name of ''Keith'' or ''Kevin.'' Kroschel said that Shaleen described himself at the loading bay as a senior driver who normally hauled from another refinery.[6]

Kroschel and Shaleen spoke again in the vicinity of the dispatch office. At this time, Kroschel offered Shaleen a union authorization card. According to Kroschel, Shaleen took the card, agreed to think it over, and asked which of Respondent's drivers he could discuss it with. Kroschel said that he suggested Berger because he felt Respondent's drivers generally liked Berger.[7]

Shaleen recalled that Kroschel offered him a union card and urged him to join. Kroschel purportedly told him that seven of Respondent's drivers had signed cards and only a couple more were needed. Shaleen denies that Kroschel mentioned Berger's name and claims that he eventually identified himself to Kroschel as the driver's supervisor.

Senior dispatcher Rodney Shelton said that he was in Shaleen's office within the next couple of days and that Shaleen discussed Kroschel's June 8 remarks to him at the Ashland refinery. In their conversation, Shelton said that Shaleen speculated from a driver's list about the identity of probable card signers. At the hearing, Shelton could recollect the names of four drivers mentioned by Shaleen as likely card signers but could not recall others named on this occasion. Drivers Berger and Leonard were not mentioned in Shelton's testimony on this point. Shaleen denied any recollection of speaking with Shelton about this matter.

3. Steven Berger's discharge

Steven Berger, who has been a truckdriver for 15 years, was employed by Respondent from June 1988 until his discharge on June 18. Less than 3 weeks before his termination, Berger received a promotion consistent with his seniority and early in 1991 he received a safe driving award under Respondent's program for having no chargeable accidents during the prior year. However, as is the case with most of Respondent's drivers, his record was not spotless.

Until Ahles' June 6 call-in memo, Berger opposed unionization. He declined Johnson's invitation to the March union meeting and when Kroschel handed Berger a union card early in the campaign, he crumpled it and stuck it back in Kroschel's pocket.

According to Berger, some of Respondent's drivers were extremely upset about Ahles' June 6 memo because it effectively precluded them from making other plans for their offdays. It caused Berger to consider the Union anew and he talked with other drivers about doing the same when he met them at both the Stillwater terminal and the Ashland refinery.

[5] Shaleen was substituting for driver Tietz who was absent with an injury. Since his promotion to his current position in early 1989, Shaleen no longer drives company transports regularly.

[6] Kroschel said that he learned Shaleen's true identity after Shaleen left. By Kroschel's account, Shaleen and Johnson (who knew Shaleen) passed each other going in opposite directions as Shaleen left the refinery property. When Johnson spoke with Kroschel, he identified Shaleen for Kroschel. Johnson corroborates Kroschel's identity account.

[7] Kroschel's impression obviously had some substance. In December 1990, the company drivers voted to select Berger as one of their representatives on an employee committee Ahles formed. Berger said that Ahles met with the committee on three occasions in December and January.

In Berger's words, he began ''itching [the Union] pretty hard'' to his fellow drivers.

During this time, Berger obtained a union authorization card from a Dahlen driver. He kept the card for about a week before mailing it, signed and dated, to the Union on June 12. In addition, Berger said that several drivers agreed to boycott the call-in requirement.

Berger was among the first to be confronted by the call-in requirement. He was not scheduled to work on June 13, 14, and 15. By the terms of Ahles' June 6 memo, Berger was eligible for assignment on those days and was required to telephone the terminal. Admittedly, he did not do so.

Berger worked his usual shift on June 16, a Sunday when Shaleen presumably did not work. When Berger arrived for work on June 17, Shaleen confronted him about not calling in on his offdays. A heated argument ensued over the fairness of the Ahles' memo. Berger told Shaleen ''your finger's not broken'' and asserted further that ''we don't think it's a fair memo.'' Berger explained that he had difficulty finding a babysitter for his three small children.

Their exchange continued slightly beyond 4 p.m., the time afternoon shift drivers are expected to be on the road. The conversation ended when Shaleen reminded Berger of that fact. Noticing that he was already late, Berger promptly boarded his truck and, admittedly, left without performing a pretrip inspection of his tractor-trailer even though he signed an inspection form.

The following morning Shaleen prepared a routine procedure reminder for Berger concerning his failure to call in as explained above. Shaleen said that he also prepared a warning notice for Berger's failure to conduct a pretrip inspection the prior evening and had decided to suspend Berger 1 day with pay, a lesser discipline used by the Company essentially to underscore the unacceptable nature of certain conduct in the driver's mind.[8] In the process, Shaleen consulted with Ahles who approved the planned suspension.

At about 10 a.m. (following the approved decision to suspend Berger), Shaleen said that he received a telephone call from George Titus, a driver formerly employed by Respondent, complaining that one of Respondent's drivers (later identified as Berger) was speeding (about 65 mph) when passing his automobile on a Minneapolis freeway between 7 to 7:30 p.m. on June 16. Titus also claimed that the truck cut too closely in front of him while completing the passing maneuver. Shaleen testified:

> George Titus called and told me on Sunday between 7 and 7:30 one of our trucks, and he stated the unit number being 202 was driving, he had been going 61 miles per hour, our truck drove by him and cut back into his lane without fully going beyond him resulting in him having to do a hard brake which had a car been behind him it would have forced him into the guard rails.
>
> . . . .
>
> Q. Did he say anything else about the incident in terms of how he perceived it or [what] the situation was?
>
> A. Just he was upset, he had his child and family with him, had he not had a prior engagement to make that he would have followed the driver to the terminal and confronted him immediately but he continued on and called me later.

Titus, now a construction worker, confirmed the June 18 call to Shaleen. Titus explained that he and his family were on their way home from dinner with his wife's parents when the incident occurred. Titus said the speed limit was 55 mph in the general area of the incident, and on the particular corner where it occurred, the speed limit was 50. Titus estimated his speed at about 62 mph and the truck's speed at 64 to 65 mph. When the truck cut into his lane, Titus said that he had to apply his auto's brakes and that he ''kind of cussed a little bit.'' Titus did not sound his horn.

Titus asserted that he was ''very upset that [the truck-driver] did not take the extra second or two to make sure he was clear.'' His wife, who was turned in the front passenger seat to play with their child in the rear seat child restraint, did not become conscious of the incident until he ''swore and put on the brakes.''

By Titus' account, he and his family continued to their home following the incident. He did not call the terminal that evening because he knew no one would be there and he did not call the following day because he was ''tied up.''

After speaking with Titus, Shaleen quickly determined from company records that Berger drove the transport identified by Titus on June 16, and that he could have been in the vicinity described by Titus at the time reported.

Asserting that Titus was a reliable source, Shaleen said that he decided to discharge Berger ''for . . . speeding once again.'' The ''once again'' alludes to Berger's official record showing that he was ticketed for speeding on April 27 in a company transport and on July 15, 1989, in his private vehicle as well as the fact that Shaleen happened upon Berger driving a company transport 65 mph in a 55 mph freeway zone during July 1990.[9]

Shaleen said that he reported the Titus call and his intention to discharge Berger to Ahles who concurred in Shaleen's the new recommendation. Both Ahles and Shaleen deny that the Union entered into their discussion about discharging Berger. Shaleen testified that the post-Titus call conversation with Ahles went as follows:

> I told him how I felt termination was the only thing in order with the night before not doing a pre-trip inspection, the citations on his record, by following him he did not want to slow down for me either, I told him to slow down. He thought termination was in order also.

Thereafter, Shaleen prepared a termination notice and left a request in Berger's box to speak with him when Berger arrived for work. When Berger reported as requested, Shaleen

[8] The routine procedure reminder related solely to Berger's failure to call the terminal as required. Respondent has a different disciplinary form used for warnings, suspensions, and discharges. No separate exhibit related to Berger's purported warning and suspension was offered but its absence might be explained by the fact that Berger was subsequently terminated on the same day.

[9] The other citations on Berger's official record include tickets for failing to fasten his seat belt in August 1988 and failing to obey a semaphore (red light) in August 1989. The latter citation was in a company transport.

handed him the termination notice. Shaleen said that Berger read the dismissal notice and asserted that the incident ''didn't happen.'' Purportedly, Berger then threw the notice but Shaleen retrieved it and secured Berger's signature on it. Shaleen said that Berger then proceeded out of his office, obviously in an agitated state, using vulgar language, threatening ''he would have [Shaleen's] job,'' and proclaiming that ''this company would . . . go down the tubes.'' Shaleen followed Berger to collect his keys, driver's card, and manuals. Berger went to the drivers' room where he began speaking with other drivers.

In the preprinted disciplinary notice, Shaleen checked two boxes, ''Violation of Safety Rules'' and ''Other.'' The ''Other'' category was completed with the words, ''Public Complaint.'' In the supervisor's remarks section, the Titus incident is recited, including the claim that Titus said he would have chased the driver to the ''loading terminal'' but for a private engagement. The remarks section lists, in order, Shaleen's observation of Berger speeding in July 1990, the August 1989 semaphore violation, the April 1991 speeding violation, and Titus' complaints about speeding and ''unprofessional driving.'' The next remarks paragraph asserts that Berger falsified his logbook on June 16 and failed to conduct a pretrip inspection on June 17 followed by a concluding paragraph which reads:

> Your disregard for the safety of the public with the driving behavior you have displayed in the past two years with [the Company] has left me to my decision as safety director/driver supervisor, to terminate you from this day forward, as to not cause any harm to the public, as well as to your well being while driving a gasoline transport for [the Company].

Meanwhile, Shaleen invited driver Leonard into his office. Leonard, who overheard Berger heatedly refer to his discharge shortly before as he passed Shaleen and Berger, testified in these words about Shaleen's remarks:

> It was very short, very brief. He [Shaleen] told me there was word going around that I had sent in a union card and he said, ''I'm not going to ask you whether you did or didn't,'' but he said, ''there's word going around that you did'' and he said, ''maybe you would like to talk it over with some of your friends how this got around.''

In fact, Leonard had signed and mailed a union authorization card to the Union on June 13. Shaleen's account of this conversation essentially accords with Leonard's. Shaleen said that he told Leonard that ''he should tell some of them people'' if he had not signed a union card.

After Shaleen had spoken to Leonard, Berger returned to Shaleen's office. At this time, Berger asked for the name of the complainant but Shaleen refused to give it to him.[10] Shaleen said they then talked about other matters during which he told Berger, ''I told you to slow down once and you didn't do that, you got a ticket for excessive speeding you didn't do that, now we got a customer complaint. Maybe you could slow down so your kids could enjoy you.''

Berger's account of his termination differs only in minor respects from Shaleen's. Berger says that he pressed Shaleen for the name of the complainant in the first conversation and that in the second conversation he essentially pleaded to get his job back which Shaleen refused to consider. The Union was not mentioned in either June 18 conversation between Shaleen and Berger.

Berger appealed his termination to Ahles in a June 20 letter. Addressing a reference in his dismissal notice about his disregard of public safety in the past 2 years, Berger reminded Ahles that he had received a safe driving award in 1990 and that his May 31 promotion letter, signed by Ahles, stated, ''Thank you for doing a great job your first 36 months with MTI, and I believe your job performance will continue in the professional manner in which you have proven it to be for the past 3 years.''

Ahles replied by a letter dated June 21. In it, he advised Berger that the only safety award criterion was no chargeable accidents during the award period. About May 31 promotion letter, Ahles wrote that ''[t]his is standard procedure and is based on seniority and acceptable performance overall.'' However, Ahles reminded Berger that ''the periods covered [by the safety award and the promotion] were not incident free.''

Thereafter, Ahles said that his ''concern is confined to the past 3 months'' and went on to state that ''[t]he list of incidents that led to your dismissal'' included: (1) speeding on March 25 and 26 as ascertained from log audits; (2) the April 27 speeding ticket; (3) logbook falsification on June 16; (4) the public complaint concerning speeding and a reckless lane change on June 16; and (5) failure to perform a pretrip inspection on June 17. These incidents, Ahles stated, ''indicates that you have decided to disregard public law and company policy and operate as you please.'' Ahles letter concludes:

> Although you may be willing to operate a vehicle without a proper pre-trip inspection and at speeds exceeding posted limits, the Company will not take the risk of endangering the public and yourself by allowing our vehicles to be operated in an unsafe manner.
>
> I endorse the Safety Director[']s actions in this matter.

Under Respondent's promotion system, established about 3 years ago, driver pay is progressively increased through six levels. Ahles asserted that promotions are essentially an automatic longevity-based scheme. ''In real simple terms,'' he testified, ''if you worked with us a year and you're still there, you are going to go up, another step.''

Nonetheless, Ahles acknowledged that driver Schiltz was reduced one driver proficiency level for 6 months under the same personnel policy following an accident. In addition, a summary of Respondent's safe driver award program alludes to the fact that the operations manager has the responsibility

[10] In February, the Company received a complaint from a woman employed by Superamerica alleging that driver Arliss Nyberg had failed to yield as she entered a freeway from an approach ramp. Shaleen gave the complainant's name and phone number to Nyberg with instructions for him to straighten the matter out with the woman. Later the woman complained to a company dispatcher that Nyberg hassled her for reporting him. Because of this experience, Shaleen said that he no longer provides complainant's names to drivers.

to notify the safety committee that a driver has completed a year of employment, normally ''when the driver[']s records are given the annual review.'' However, no written personnel policies related to annual reviews, promotions, or demotions are in evidence.

To put Berger's driving record in perspective, the General Counsel introduced selected records of several other drivers. The records of three drivers, Ted Burkhardt, Dean Schliecher, and Schiltz, merit summary.

As noted, Schiltz, who vehemently opposed to the Union, was reduced one pay level in November 1990 following an accident. Ahles' memo imposing that discipline states that senior drivers described Schiltz as ''accident waiting to happen'' because of his speeding habits. A month later, Schiltz received a speeding citation in his private automobile.

Other records related to Schiltz reflect that he was subsequently respon- sible for a spill in May 1991 at the Ashland refinery and was the subject of a public complaint about speeding and reckless driving in July 1991. In addition to the foregoing, Ahles acknowledged that Schiltz had numerous other routine procedure reminders in his file and his logbook audit for the month of March 1991 (the same month and the same audit alluded to by Ahles in his response to Berger's appeal) reflects speeds in excess of the company standard on five separate dates.

Burkhardt, a senior driver whose union proclivities are unknown, was said by Ahles to have numerous routine procedure reminders in his file. In addition, Burkhardt received a disciplinary warning in May 1990 for failing to conduct a pretrip inspection and his log audit for the month of March 1991 reflects speeds in excess of the company standard on four separate dates.

On September 4, Burkhardt failed to appear for work as scheduled and Shaleen set out to locate him. Later that morning, Burkhardt called to report that he had been arrested driving his private auto at 4:30 a.m. that morning (he was due at work at 5 or 5:30 a.m.), charged with driving while intoxicated, and jailed. Burkhardt was given a disciplinary warning for an ''unexcused absence.'' Subsequently, Burkhardt's license was revoked for 1 year and he was granted a year's leave of absence from his company driving position. Shortly more than a week later, Burkhardt was hired as a truck washer, and promoted a short while later to one of the dispatcher positions.

Schliecher, a driver whose union proclivities are also unknown, was given a routine procedure reminder for failing to call in on July 16, 17, and 18 ''per the new policy.'' In January 1991, Schliecher received a speeding citation and became embroiled in an argument with the highway patrolman. Schliecher received a written warning about this incident which, in effect, placed him on probation for 1 year. The warning states that he would be subject to termination for ''one (1) more incident with unfavorable behavior in the operation of company equipment in the next year.''[11] In April 1991, Schliecher was given another written warning for failing to report traffic citations as required following a citation on April 7 for ''failure to obey semaphore.'' Schliecher was still employed at the time of the hearing but the claim was made that he was very close to being discharged.

[11] Schliecher was cited for speeding 70 mph in a 55-mph zone. The warning reflects that the Minnesota Highway Patrolman who cited Schliecher asserted that the manner in which Schliecher was operating his company transport was ''very unprofessional, with a disregard for the safety of people and property.''

C. *Further Findings and Conclusions*

1. The 8(a)(1) allegations

Employer interference, restraint, or coercion of employees exercising the statutory right, inter alia, to ''form, join, or assist labor organizations'' is an unfair labor practice under Section 8(a)(1) of the Act. The test under Section 8(a)(1) is not whether the questioned employer conduct succeeded but whether, in the circumstances, the conduct *reasonably tends* to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Jay Foods v. NLRB*, 573 F.2d 438 (7th Cir. 1978).

The General Counsel argues that Ahles' March 26 notice both asks employees to report union activities and implies that Ahles intended to take action against the perpetrators, i.e., ''You do not have to put up with this'' Respondent argues that the notice implicitly limited the solicitation of reports about union activity to those actions by noncompany drivers which interfere with workplace safety and the Company's reputation, both legitimate concerns of the Respondent.

Although the bulk of Ahles' March 26 memo addresses nonemployee activity of a potentially illicit character, his solicitation to report about union activities ''[i]f you are harassed at the rack or while you are working'' is plainly a dragnet response. In the circumstances found here, Respondent's claim that it intended for employees to report only illicit activities by drivers of other companies is extremely dubious. On the contrary, Shaleen's subsequent conduct demonstrates, if the testimony of Leonard, Shelton, and Tietz is any gauge, that he entertained or acted on many rumors of union activity without regard for their source or content.

The Board has found employer solicitations to employees about reporting union activity if they felt ''harassed'' to be unlawful ''because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities.'' *Hawkins-Hawkins Co*., 289 NLRB 1423 (1988), and the cases cited there at footnote 5.

Such subjectivity is evident here. Some drivers obviously interpreted the persistence of the union solicitors as harassment; others, such as Tietz, did not. When this is coupled with Respondent's implied willingness to intervene so employees would not have to ''put up with this,'' the message becomes clear. Employees choosing to lawfully promote the Union in the course of their routine contacts away from Respondent's premises would be doing so at the risk that their activities might be misconstrued and that management retribution might result. I find that any such message would reasonably tend to interfere with employee protected activity and, hence, that the solicitation about reporting union activity in Ahles' March 26 notice is unlawful.

With respect to the June 18 Shaleen-Leonard conversation, the General Counsel argues, in effect, that the tenor of the exchange creates the impression that Leonard's union activities are under surveillance by Respondent. Respondent claims that the conversation fails to establish that Shaleen was en-

gaged in coercive interrogation and that the incident was isolated.

I agree with the General Counsel's contention. Clearly, Shaleen's words on this occasion served to inform Leonard that rumors about lawful union activities were monitored by management. And by suggesting that Leonard talk to other drivers if he had not signed a union card plainly burdened this driver with the dilemma of proving to Shaleen's satisfaction that the rumor about him was not true by publicly repudiating the Union before his fellow drivers, or facing some consequence for failing to do so. Accordingly, I find that the Shaleen's June 18 remarks to Leonard amount to unlawful interference.[12]

2. The 8(a)(3) allegation

Employer ''discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization'' is an unfair labor practice under Section 8(a)(3) of the Act. Proof of discrimination within the meaning of the Act is governed by the following principles, summarized by the Board in *Hunter Douglas, Inc*., 277 NLRB 1179 (1985):

> The Board held in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989, that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ''persuade'' that the action would have taken place absent the protected conduct ''by a preponderance of the evidence.'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co*., 256 NLRB 53 (1981).

I find that the General Counsel's prima facie showing that Berger's discharge was motivated by protected conduct was sufficient to shift the burden of persuasion to Respondent. The General Counsel's evidence shows that Berger, initially an opponent of unionization, became sufficiently interested to sign a card and promote the Union among his fellow drivers shortly before his termination and shortly after his May 31 promotion.

The General Counsel also established that Respondent was strongly opposed to unionization among its drivers and carefully monitored union support among its drivers, especially at the precise time of Berger's discharge as evidenced by the Shaleen-Leonard June 18 conversation found unlawful above.[13] Moreover, the General Counsel's case established a basis for finding Respondent knew of Berger's conversion to the union cause based on the June 8 Shaleen-Kroschel conversation at the Ashland refinery.

Berger admittedly failed to follow the call-in procedure specified in the June 6 notice and failed to perform a pretrip inspection on June 17. Likewise, his traffic citations are a matter of public record and Berger made no effort to contest the fact that Shaleen observed him speeding in July 1990. To establish, nevertheless, the discriminatory character of Berger's termination even in the face of what appears at first blush as solid grounds for discharge, the General Counsel introduced numerous personnel records reflecting, in sum, that Respondent's tolerance of numerous similar, or worse, derelictions on the part of other drivers before and after Berger's discharge.

In my judgment, the foregoing summary describes a strong prima facie showing that Berger was discharged for his union activity.

Respondent's defense is threefold. First, it claims that it was not aware of Berger's union sympathies. Second, it claims good cause existed for Berger's discharge. And third, it argues that Berger was not treated disparately.

At the outset, I credit Kroschel's claim that he suggested Berger as a person Shaleen could speak with about the Union during their June 8 exchange. Shaleen's claim that he eventually identified himself as the drivers' supervisor and, thus, would be an unlikely person to whom Kroschel would identify any of Respondent's employees as union adherents, detracts considerably from my willingness to rely on his version of the June 8 exchange.

The evidence shows that Shaleen was previously unknown to Kroschel. Shaleen's testimony about their conversation prior to the supposed disclosure of his status indicates that he was attempting to mislead Kroschel about his identity. That evidence and other circumstances indicating that Berger's union interest was recent and intense as well as Johnson's corroboration of Kroschel's identity claim causes me to rely on Kroschel's testimony about the June 8 exchange where it conflicts with Shaleen's.[14]

For this reason, I reject Respondent's assertion that it was unaware of Berger's union interest. Clearly the June 8 exchange between Kroschel and Shaleen served to signify a connection between Berger and Kroschel, the unrelenting union protagonist long known to company officials.

Moreover, other evidence shows that many drivers frequently reported on the ongoing union activity at the Ashland refinery and that Shaleen became keenly interested about identifying union supporters among Respondent's drivers following his June 8 exchange with Kroschel. Based on these circumstances and Shaleen's accuracy in singling Leonard out as a card signer—supposedly based on rumor—at this critical time, I conclude that Respondent's claimed ignorance of Berger's union activity is not truthful.

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[12] Although Respondent's claim that this exchange did not amount to coercive interrogation might be true, that argument misperceives the allegation.

[13] The post-June 8 conversation between Shaleen and Shelton is further evidence of Shaleen's union monitoring activity. However, as this evidence was offered on rebuttal following claims by management officials that they were unaware of Berger's union activity, no consideration is given that evidence in assessing General Counsel's prima facie case.

[14] I reach this conclusion notwithstanding Shelton's failure to recall any mention of Berger's name during his testimony about his post-June 8 meeting with Shaleen. As noted, Shelton likewise made no mention of a reference to Leonard in this conversation but Shaleen admittedly confronted Leonard about signing a union card only a few days later.

Respondent's next two defenses are related but, of necessity, the focus must be on its claim that Berger was not treated disparately. The *Wright Line* standard requires more than a mere showing that legitimate cause for discharge existed; as seen above, it requires Respondent to persuade by a preponderance of the evidence that the action at issue would have taken place absent the protected conduct. Furthermore, if this case illustrates anything, it is that Respondent must tolerate a certain level of imperfection among its drivers. If it did not, hardly any of Respondent's current drivers would still be employed.

In my judgment, Respondent has failed to carry its burden of persuasion. The dividing line between Berger's derelictions and those of some other drivers is hazy, if not nonexistent altogether. This is especially true with respect to drivers Burkhardt, Schliecher, and Schiltz.

In each of these three other cases, serious deficiencies appear to have been ignored or tolerated. Thus, despite the warning that Schliecher would face termination for one further incident similar to his speeding violation in January, Respondent failed to carry out this threat 3 months later when he again received a traffic citation, this time for running a traffic signal. Burkhardt was given a leave and placed in a nondriving position and subsequently promoted after being arrested and having his license suspended for driving while intoxicated. Even worse, the circumstances strongly indicate that Burkhardt was enroute to work when this incident occurred despite Shaleen's unsubstantiated assertion to the contrary. Schiltz, characterized as an accident waiting to happen by his fellow drivers and demoted, kept his job despite several subsequent incidents.

By contrast, Berger was promoted and then terminated less than 3 weeks later following a complaint by a former driver who, purportedly, was so concerned about the nonaccident incident that he took nearly 2 days to report it. And unlike every other public complaint seen in this case, the decision to discharge Berger was made before Berger was confronted with the report and provided with an opportunity to explain his version of what occurred.[15]

Ahles assertion that Berger's May 31 promotion was merely an automatic longevity step is less than convincing in light of the evidence that the same personnel policy was used to demote Schiltz and other evidence suggesting that the driver's records are reviewed annually at or near their anniversary date.

Equally disturbing are the pretexts and exaggerations cited to buttress the claim that Berger's record merited his discharge and the effort to minimize conduct by others similar to Berger's.

The claim that Berger falsified his logbook on June 16 is belied by Respondent's own effort to explain away the significant number speed standard violations reflected in its log audits. Among the explanations provided for these speeding excesses is the fact that drivers, on occasion, inaccurately record their actual driving hours. This explanation alone suggests that the drivers' logs are not precisely kept, the point Berger made when asked to respond at the hearing to the falsification claim.

Shaleen's casual implications that Schliecher's failure to call on his offdays in July was understandable because he lived near the Iowa border at the time and that another driver, in effect, was not entirely responsible for running an auto off the road into a ditch in an incident similar to the Berger-Titus matter because the auto was in the driver's blind spot further detract from the persuasiveness of Respondent's case.

In sum, I have concluded that Respondent failed to carry its burden of persuasion in this case. The ''throw the book at 'em'' discharge of Berger lacks credibility in the context of Respondent's treatment of other drivers. Hence, I conclude that after Respondent learned that Berger, a driver obviously respected by his peers, had been converted to the union cause, it seized an early opportunity to discharge him. The circumstances shown to exist here merit the inference, which I have made, that absent Berger's union activity, he would not have been discharged for any of the reasons which arose between June 13 and the date of his termination. Accordingly, I find that Berger's June 18 discharge was unlawful.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By soliciting employees to report union activity to management in a notice posted and distributed on March 26, and by creating the impression that Gerald Leonard's union activity was under surveillance, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Steven Berger on June 18, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

[15] Berger's claim that the Titus incident did not occur does not raise any further question. As the incident was described by Titus, Berger may well have been unaware that it did occur.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

To remedy Berger's unlawful discharge, Respondent must offer, in writing, to immediately reinstate Berger to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other benefits. Respondent must also make Berger whole for the loss of pay and benefits suffered by reason of the discrimination against him.

Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to any trust fund account on behalf of Berger shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondent must further expunge from any of its records any reference to Berger's June 18 discharge, and notify Berger, in writing, that such action has been taken and that any evidence related to that discharge will not be considered in any future personnel action affecting him. *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent, Mississippi Transport, Inc., Stillwater, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees in order to discourage membership in a labor organization.

(b) Making statements to employees which tend to create the impression that employee union activity is under surveillance.

(c) Soliciting employees to report lawful union activity to management officials.

(d) In any like or related manner interfering with, restraining, coercing, or discriminating against employees because they exercise rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer to reinstate Steven Berger and make him whole for all losses resulting from his June 18, 1991 discharge as specified in the remedy section of the judge's decision in this matter.

(b) Expunge from its records any reference to Steven Berger's discharge on June 18, 1991, and notify him, in writing, that such action has been taken and that this discharge will not be used in any future personnel action involving him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine compliance with paragraphs 2(a) and (b), above.

(d) Post at its Stillwater, Minnesota terminal copies of the attached notice marked ''Appendix.''[17] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that complaint paragraph 5(c) be dismissed in accord with the General Counsel's motion granted herein.

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discriminate against employees in order to discourage membership in General Drivers, Helpers and Truck Terminal Employees, Local No. 120, affiliated with International Brotherhood of Teamsters, AFL–CIO, or any other labor organization.

WE WILL NOT make statements to our employees for the purpose of creating the impression that your union activities are under surveillance by us.

WE WILL NOT request our employees to report lawful union activity to us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they exercise their rights guaranteed by Section 7 of the Act.

WE WILL immediately offer to reinstate Steven Berger to his former position, and pay him for wages and benefits he lost as a result of his June 18, 1991 discharge with interest as provided by law.

WE WILL notify Steven Berger in writing that we have expunged any reference to his June 18, 1991 discharge from our records and that we will not rely on that discharge in any future personnel actions involving him.

MISSISSIPPI TRANSPORT, INC.